

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

DENISE JUNEAU

STATE OF MONTANA

* * * * *

IN THE MATTER OF [STUDENT] OSPI 2014-03

FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * * *

[PARENTS] parents of [STUDENT] filed a request for a due process hearing on this matter on October 1, 2014. A response was filed by the *** Public School [DISTRICT] on October 20, 2014. State Superintendent of Public Instruction, Denise Juneau appointed Christopher Manos as hearing officer in this matter on October 15, 2014. The parties stipulated to an extension for holding a hearing and waived the 45 day period in which a decision is required. A.R.M. MT 10.16.3523.

A prehearing conference was held November 5, 2014 and an Order issued November 23, 2014 with deadlines for discovery, witness and exhibit lists and pre-trial motions. Parties agreed to a hearing of four days commencing January 27, 2015 in *** , MT. [STUDENT'S] attorney submitted a Motion in Limine and [the DISTRICT'S] attorney submitted a Motion for Partial Summary Judgment. An order was issued January 22, 2015 granting [STUDENT'S] Motion in Limine and limiting [the DISTRICT'S] evidence or testimony regarding [STUDENT'S] relationship with her sibling. The [DISTRICT'S] Partial Summary Judgment was taken under advisement until completion of the testimony and hearing.

The due process hearing in this matter was held over a course of fifteen days including the originally scheduled four days January 27-30, 2015, then continuing

February 11-12, February 24-27, March 2, March 23, March 25 and April 15-16, 2015.

[PARENTS' attorney] appeared on behalf of the parents of [STUDENT] who were present during the entire due process hearing; [DISTRICT'S attorneys] appeared on behalf of [DISTRICT] and [DISTRICT'S] representative *** was present during the entire due process hearing. Over thirty witnesses testified at the hearings: [WITNESSES] Parties filed Stipulated Facts and Stipulated exhibits prior to the hearing. At the hearing ninety Stipulated Exhibits were admitted. Parties submitted further exhibits and sixty-seven [STUDENT] exhibits and twenty-two [DISTRICT] exhibits were admitted.

Parents of [STUDENT] through their attorney presented the following issues in their Request for Due Process:

1. Whether [DISTRICT] violated its "Child Find" duties under IDEA by failing to identify, locate and evaluate [STUDENT] as a student with a disability under the IDEA while she was in middle school at *** Middle School.
2. Whether [DISTRICT] failed to provide [STUDENT] a free appropriate public education (FAPE) by violating its "Child Find" duties.
 1. Whether [DISTRICT] failed to provide procedural safeguards to Petitioners by failing to identify [STUDENT] as a student with a disability under IDEA from 2009 through February 2013.
 2. Whether the [DISTRICT'S] initial evaluation of [STUDENT] in February 2013 was adequate.

3. Whether [DISTRICT] failed to develop an IEP from 2009 through the present which offered [STUDENT] a free appropriate public education.
4. Whether [DISTRICT] failed to provide adequate written prior notice under IDEA in notifying Petitioners about its refusal to place [STUDENT] in a residential placement facility.
5. Whether Petitioners are entitled to reimbursement for the non-medical costs of placing [STUDENT] at *** Academy [ACADEMY] beginning July 2014 because [DISTRICT] failed to provide FAPE to [STUDENT] in a timely manner.
6. Whether Petitioners are entitled to reimbursement for the non-medical costs of placing [STUDENT] at [ACADEMY] as compensatory education.
7. Whether Petitioners are entitled to compensatory education for the 2009-2010, 2010-2011, 2011-2012, 2012-2013 and 2013-2014 school years.

Stipulated Findings of Fact

1. [STUDENT] was born November 4, 1997 and is currently 17 years of age. She is a resident of the *** district ([DISTRICT]). Although she is temporarily residing in *** while attending [ACADEMY], [DISTRICT] is still her resident school district. She would be placed in 11th grade if she were attending [DISTRICT].
2. [STUDENT] did not attend [DISTRICT] school until her enrollment at *** Middle School, for the 2009-10 school year. [STUDENT] attended 6th, 7th

and 8th grade at *** Middle School – 2009-2010, 2010-2011 and 2011-2012 school years.

3. [DISTRICT] did not conduct an evaluation pursuant to IDEA of [STUDENT] during her time in middle school.
4. During the 2012-2013 school year, [STUDENT] attended 9th grade at *** High School, a [DISTRICT] school.
5. [DISTRICT] developed a Section 504 accommodations plan for [STUDENT] on November 8, 2012.
6. [STUDENT] was referred for an IDEA evaluation on January 22, 2013 by a member of [DISTRICT] staff. The evaluation was completed February 14, 2013. She was in 9th grade at the time.
7. [DISTRICT] completed an evaluation of [STUDENT] and held an evaluation report meeting on February 14, 2013 wherein the team of [DISTRICT] personnel and [STUDENT]'s parents determined that [STUDENT] qualified for IDEA special education and related services under the category of emotional disturbance.
8. [DISTRICT] convened and held an IEP team meeting on March 7, 2013, wherein an IEP was developed for [STUDENT]. [STUDENT]'s mother consented to the IEP on March 13, 2013.
9. [STUDENT] attended 10th grade at *** High School.
10. The IEP team reconvened twice at the beginning of [STUDENT]'s 10th grade, on September 4 and September 19, 2013. [STUDENT] had some absences at the beginning of that year. [DISTRICT] convened the team

meeting on September 19, 2013 to discuss this issue. The team discussed [STUDENT]'s behaviors regarding class avoidance and interventions to address this issue.

11. [STUDENT]'s mother removed [STUDENT] from school and placed her at ***, September 24, 2013. [STUDENT]'s mother placed [STUDENT] at [RESIDENTIAL TREATMENT FACILITY] October 2013.
12. [DISTRICT] convened a meeting on October 11, 2013, wherein the team discussed [STUDENT]'s return to school.
13. By December 3, 2013, [STUDENT]'s parents had provided [DISTRICT] with the "Psychological Evaluation: School Version", a report by ***, Ph.D., dated November 18, 2013 based upon the evaluation of [STUDENT] she had conducted in October 2013.
14. [STUDENT] was discharged from [RESIDENTIAL TREATMENT FACILITY] on February 18, 2014.
15. [DISTRICT] convened and held several IEP meetings on February 21, 2014, February 26, 2014, March 25, 2014, April 8, 2014 and April 17, 2014. The team explored options during these meetings and some of [STUDENT]'s private providers gave input to the team. [STUDENT]'s parents requested residential placement.
16. [DISTRICT] initiated a re-evaluation of [STUDENT] with parental consent on March 14, 2014.
17. Following the April 17, 2014 IEP meeting, [DISTRICT] received a letter from [STUDENT]'s parents directed to [DISTRICT REPRESENTATIVES]

stating they rejected the draft IEP that was presented and discussed during the April 17, 2014 meeting, providing notice of their intent to place [STUDENT] in a residential placement at [BOARDING SCHOOL].

18. On April 24, 2014, [DISTRICT REPRESENTATIVE] sent [STUDENT]'s parents a proposed IEP that contained some additions since the April 17, 2014 meeting. In her cover letter, [DISTRICT REPRESENTATIVE] stated that the enclosed IEP constituted [DISTRICT]'s offer of FAPE.
19. [DISTRICT REPRESENTATIVE] sent a letter to [STUDENT]'s parents dated May 5, 2014, entitled "Prior Written Notice regarding Proposed IEP and Offer of FAPE."
20. [DISTRICT] received a letter from [STUDENT]'s parents dated May 10, 2014, wherein the parents rejected the proposed IEP and stated their intent to place [STUDENT] in a therapeutic boarding school and seek reimbursement for this placement from [DISTRICT].
21. On May 19, 2014, [DISTRICT] sought and obtained parental consent to perform an additional assessment of [STUDENT].
22. [DISTRICT REPRESENTATIVE] sent a letter to [STUDENT]'s parents dated May 21, 2014 restating [DISTRICT]'s position that it would not pay the costs of residential placement.
23. [DISTRICT] conducted another evaluation of [STUDENT] and held an evaluation report meeting on June 9, 2014 wherein the team of [DISTRICT] and [STUDENT]'s parents determined that [STUDENT] qualified for IDEA special education and related services under the category of autism.

[STUDENT] remains qualified for IDEA special education and related services from the [DISTRICT].

24. [DISTRICT] received a letter dated June 13, 2014, wherein the parents notified [DISTRICT] that they would be placing [STUDENT] at [ACADEMY], which was a different facility than the parents had previously identified.

25. [DISTRICT REPRESENTATIVE] sent a letter to [STUDENT]'s parents dated June 24, 2014 reiterating that the IEP sent to them May 5, 2014 remained [DISTRICT]'s offer of FAPE and again denying payment for the requested costs of residential placement.

26. On June 26, 2014, [DISTRICT] sent [STUDENT]'s parents a copy of the June 9, 2014 Evaluation Report.

27. [STUDENT]'s parents placed her at [ACADEMY] on July 7, 2014.

[STUDENT] continues to reside there.

28. The request for due process was filed in this matter on October 1, 2014.

[DISTRICT] filed its response on or about October 20, 2014.

Findings of Fact

29. [MOTHER] is the mother of [STUDENT]. She is married to [FATHER], who has adopted [STUDENT]. [STUDENT] attended private school in *** for pre-school and elementary school. Prior to her placement by her parents at [ACADEMY], a therapeutic boarding school in ***, [STUDENT] resided in the family home with her parents. Her brother, [BROTHER], also lived in the family home until he moved out in September 2013.

30. [STUDENT]'s biological father was murdered in 2008. [Test. [MOTHER] 982]
31. [STUDENT] had a close relationship with her father. [Ex. R-12]
32. [STUDENT] struggled with the loss of her father and more often around the anniversary of his death in February. [Test. *** 249-2450]
33. [STUDENT] and her older brother [BROTHER] according to ***, a clinical psychologist who evaluated [STUDENT] in 2013, [STUDENT] had an "intense love-hate relationship" and that [BROTHER] 'beat [STUDENT] up for no reason.' [Ex. R-12]
34. [STUDENT] believes as does her mother that [BROTHER] physically abused her. [Test. *** 1509, Test. [MOTHER] 1051 – 1052]
35. [BROTHER] had 'severe' problems and created a lot of dysfunction in the home." [Ex. R-8, R-18]
36. Apparent from the hearing and testimony, [PARENTS] are caring, concerned and involved parents of [STUDENT], focusing on the best for their daughter. Throughout her childhood years they have sought various school/academic settings for [STUDENT], first in private***, MT schools - age 2 with a church affiliated daycare [Test. [MOTHER] 972-974], age 3 in a pre-school –*** School [Test. [MOTHER] 974], age 4 in *** school, [Test [MOTHER] 976-977] and age 5 in a private school – *** from kindergarten through 5th grade. [Test. [MOTHER] 977] [STUDENT] entered [DISTRICT] public schools in 6th grade at *** Middle School and continued through 8th grade. [STUDENT] attended 9th grade at the *** School and then part of

10th grade at *** until her parents in September 2013 admitted her to *** Hospital, *** for depression and suicidal ideation. [STUDENT] remained for 5 days. [Test. [MOTHER] 1000-1003] [STUDENT] was then placed in the *** Program and admitted by her parents to a residential treatment facility, [RESIDENTIAL TREATMENT FACILITY], Billings, MT in October 2013 until February 2014. [Ex. S-75, S-70; Test. [MOTHER] 1063-1064] Following her discharge from [RESIDENTIAL TREATMENT FACILITY] in February 2014, she was enrolled in [DISTRICT] at *** High School, *** , MT but did not attend any [DISTRICT] school and in July 2014 [STUDENT] was placed by her parents at a therapeutic boarding school, [ACADEMY], where she currently resides.

37. [STUDENT]'s challenges in the various daycare, pre-school and private school settings included behavioral and social problems – hitting other children, not making friends, leaving the classroom, hiding in bathrooms and other places but doing better in smaller classroom settings or calming areas. [STUDENT]'s challenges in public school were absences, few social interactions and academic issues with turning in school assignments late and some declining grades.
38. [STUDENT]'s parents have sought various mental health professionals' help for their daughter beginning at the age of 4, with a mental health therapist – [THERAPIST], LCSW to help [STUDENT] with social issues and therapy for her at various times throughout her school years, especially around the death of her father and that anniversary (February) but also

addressing other family and school issues continuing through her placement at [ACADEMY] in July 2014. In 2003, [STUDENT]'s first grade teacher at *** School recommended she get tested. [Test. [MOTHER] 977-980] [STUDENT]'s mother took her to *** , a licensed clinical psychologist who evaluated [STUDENT] and diagnosed her with Attention Deficit Hyperactivity Disorder (ADHD). [Ex. S-78; Test. [MOTHER] 974] In 2008, [STUDENT]'s mother took her to Dr.***, also a licensed clinical psychologist who diagnosed [STUDENT] with a non-verbal learning impairment of unknown etiology and mood disorder. [Ex. S-77; Test. [MOTHER] 981] Dr. *** also referred [STUDENT] to Dr. *** , a psychiatrist who eventually prescribed medication for [STUDENT]'s ADHD. [Test. [MOTHER] 981-982] [STUDENT] was in the 5th grade at that time. None of these treating or evaluating medical professionals diagnosed Asperger's or autism. In May 2010, [STUDENT] wrote a suicide note at school and was psychiatrically hospitalized at *** for 5 days, then in the *** Program for a period of time. [Test. [MOTHER] 1000-1003]. In October 2012, [STUDENT] received mental health services under the Comprehensive School and Community Treatment (CSCT) program from a clinical professional counselor [COUNSELOR]. [Ex. P-54] In October 2013, [STUDENT]'s mother took her to Dr.*** , a clinical psychologist who diagnosed [STUDENT] with autism and was the first of all of the treating mental health professionals including her continuing therapist since a young child, *** , to

diagnose her with autism. In January 2013, [DISTRICT] counselor *** referred [STUDENT] for an IDEA evaluation. [Ex. S-4]

39. [STUDENT]'s parents have had over the years some conflicting goals for their daughter:

- a. They wanted her to excel in academic areas of her interest including animal sciences with a desire for her to graduate from high school and go to college. [Test. [MOTHER] 1033-1034] All [STUDENT]'s life she has had a strong interest in horses.
- b. They did not want too rigorous an academic program, however, as school created stress causing [STUDENT] to become frustrated and anxious. [Test. [THERAPIST] 2525-2528]
- c. They did not want her absent from school but allowed her in middle school to either stay home or come home early when she called from school until the 8th grade when her mother would encourage her to stay at school. [Test. [MOTHER] 1029-1030]. Fewer absences occurred in the 8th grade in comparison to 6-7th grades.
- d. They did not want her to be considered disabled and be treated differently by her peers or separate classes in elementary and middle school.
- e. They, however, are claiming that [STUDENT] should have been evaluated for a disability under IDEA from middle school (2009) until high school (2012).

- f. They wanted small classes and structured instruction in high school to foster her academic interests and she was enrolled in the *** High School. They believed the smaller classes and academics would curb her absences or disinterest in some classes (physical education) but she continued to struggle.
- g. A 504 intervention plan was implemented to address those struggles.
- h. They agreed to an evaluation in February 2013 and IEP for [STUDENT] in March 2013.
- i. They were aware of her marijuana usage beginning in spring 2013 through fall 2013.
- j. They were aware of her difficult relationship with her older brother, [BROTHER] and his abuse of [STUDENT]. [Test [MOTHER] 1051-1052]
- k. They wanted her to be safe at school.
- l. They explored other alternative options including private boarding schools but preferred [STUDENT] not to leave *** , MT. [Ex.R-8, R-10, Test [MOTHER] 1244]
- m. They wanted many goals for [STUDENT] in her proposed April 2014 IEP but they did not want a full school day with classes and wanted graduation by 12th grade with a regular diploma.
- n. They kept her out of public school from her discharge from [RESIDENTIAL TREATMENT FACILITY] in February 2014 until

she had an updated IEP in place but explored therapeutic boarding schools from December 2013 – April 2014.

- o. They did not want a restrictive environment but placed her in a residential treatment facility *** in October 2013 and in a therapeutic boarding school [ACADEMY] in July 2014 where she currently resides.

40. [DISTRICT] starting working with [STUDENT]'s parents and [STUDENT] at

** Middle School:

- a. During middle school, teachers and administrators responded to the mother's email, phone and personal inquiries regarding her daughter's late or missing assignments, grades and absences. [Test. [MOTHER] 1026-1028, 1168-1169, 1354-1355]
- b. A Student Intervention Team met to discuss [STUDENT]'s issues during middle school. [Ex. S-54]
- c. [DISTRICT] creating a 504 plan for intervention in high school in November 2012. [Ex. S-3]
- d. In January 2013, [DISTRICT] ** High school counselor made a referral for an evaluation of [STUDENT] in 9th grade, [DISTRICT] conducted an evaluation in February 2013 that resulted in a determination that [STUDENT] qualified for IDEA special education and related services under the category of emotional disturbance and [DISTRICT] then developed an IEP in March 2013 that was consented to by [STUDENT]'s parents. [Ex. S-4, S-5]

- e. In September 2013, two meetings were held to respond to [STUDENT]'s mother's request to meet to address various issues including safety with [STUDENT] leaving school grounds during the school day and engaging in risky behaviors. [Ex. P-81, P-82]
 - f. Scheduled a meeting requested by the mother in October 2013 to address [STUDENT]'s return to [DISTRICT] after she was hospitalized *** in September and then placed by her parents in a residential treatment facility in October.
 - g. Scheduled meetings shortly upon [STUDENT]'s discharge from [RESIDENTIAL TREATMENT FACILITY] in February, and further meetings in March and April 2014 to review her IEP and update for her return to [DISTRICT]. [Ex. P-83, S-6, S-53]
 - h. Received from mother detailed notes from meetings held in September 2013 through April 2014.[Ex. S-52,S-53]
 - i. Offered an updated, revised proposed IEP in April 2014 for placement within [DISTRICT]. [Ex. S-6]
 - j. Provided the April 2014 IEP and written notice of providing FAPE in May 2014.[Ex. S-18,S-19,S-20,S-21]
 - k. Did an additional evaluation in May 2014 resulting in a determination in June 2014 that [STUDENT] qualified for IDEA special education and related services under the category of autism.[Ex. S-12]
41. During middle school, no request for an evaluation or special education was recalled by the school principal of 13 years but [STUDENT]'s mother

alleges she did bring concerns to [STUDENT]'s teachers or other staff about [STUDENT]'s eligibility for IDEA or special education. [Test. [MOTHER] 1173; Test. ** 2125]. She communicated about late assignments and absences. The school principal was attuned to look for reasons to suspect students in need of special education as he was a special education teacher before becoming a principal. [Test. *** 2117, 2153].

42. Mother alleges that either [PRINCIPAL] or other counselor's or teachers recollections were not accurate. She had conveyed diagnosis and medical professionals' information. However, no other middle school staff members brought concerns to [PRINCIPAL] about the need to conduct a special education evaluation for [STUDENT]. [Test. [PRINCIPAL] 2126].

43. Other teachers or counselors who also had special education training never saw a need to refer [STUDENT] for a special education evaluation. [Test. *** 1394, 1398; Test. *** 2209; Test. *** 2240; Test. *** 2257]. In particular, Ms. *** who herself had two sons and a nephew with autism and is very observant of students showing signs of autism observed no evidence that [STUDENT] needed an evaluation for autism. [Test. *** 2257-2259].

44. If a middle school staff member believed that [STUDENT] was in need of a special education evaluation, they would have raised the issue with fellow staff members and administrators. [Test. *** 2196; Test. *** 2161; Test. *** 2245; Test. *** 2259].

45. Dr. *** as the parents' expert, acknowledged that the IDEA does not require a school district to provide notice of any procedural safeguards if there is no reason to suspect a student has a disability. [Test. *** 275].
46. Dr. *** acknowledged that knowledge of a diagnosis alone is insufficient to trigger an obligation to evaluate a student under the IDEA. [Test. *** 245].
47. It is not unusual for students to have outside counselors and for school counselors when appropriate to have contact with these professionals. This knowledge does not rise to the level of needing to refer the student for an evaluation. [Test. *** 1392]
48. [STUDENT]'s mother acknowledged that she received a copy of the [MIDDLE SCHOOL] Handbook upon [STUDENT]'s enrollment and every year of attendance and reviewed it. [Test. [MOTHER] 1173]. The handbooks during the time [STUDENT] attended [MIDDLE SCHOOL] contained information about a student's eligibility for special education services and explained [DISTRICT]' Child Find obligations. [Ex. S-60, S-61, S-62].
49. [STUDENT] was hospitalized in sixth grade in *** for suicidal ideation. [Test. [MOTHER] 1001-1002].
50. [STUDENT]'s suicidal ideation related to her friend leaving middle school and troubles with her brother. [Ex. R-16, Test. [MOTHER] 1001].
51. Beginning in seventh grade, [STUDENT] conveyed to her therapist, her current family issues. [Ex. R-16].
52. [MIDDLE SCHOOL] began using interventions with [STUDENT], in seventh grade. [Test. *** 2232]. [STUDENT] was placed in a strategies class to

assist her in organization and to provide an opportunity to assess her for skill deficits. [Test. *** 2231-2232]. [STUDENT] responded well and received good marks and did not qualify for any other interventions. [Test. *** 2232, 2240, 2242].

53. [STUDENT]'s grades throughout sixth, seventh and eighth grade fluctuated with some failing but others average. They varied by class and quarter. [Ex. P-7, P-8, P-9]

54. There were a few documented disciplinary issues in middle school but they were not a concerning level of behavioral referral for a student. [Ex. S-2]

55. [STUDENT]'s older brother continued to act aggressively toward her throughout her middle school years. [Test. [MOTHER] 1198].

56. In eighth grade, [MIDDLE SCHOOL] staff referred [STUDENT] to the Student Intervention Team (SIT). [Ex. S-54, Test. *** 219].

57. The purpose of SIT was to provide an intervention for any student with behavioral, academic, attendance, or other problems. [Test *** 2159]. Dr. *** agreed that a school district implementing interventions, including intervention teams, is consistent with a school district's obligations under the IDEA. [Test. *** 111].

58. While Dr. *** acknowledged she was unaware of what was going at home while [STUDENT] was in eighth grade, she admitted that issues at home can affect a student's performance in school. [Test. *** 323. 377].

59. At some point in middle school, [STUDENT]'s mother and her therapist began discussing education alternatives for [STUDENT] including therapeutic boarding school. [Ex R-10, Test. [MOTHER] 1244 – 1245].
60. [STUDENT]'s teachers provide some accommodations to turn in work late or attend Saturday school, resulting in raising her grades. [Ex.P-58; Test.. *** 480, 515; Test. *** 2252].
61. The SIT team, which was charged with referring students for special education evaluations, if necessary, did not refer [STUDENT] for an evaluation. [Test. *** 2199; Test. *** 2161; Test. *** 2254-2255].
62. [STUDENT] not unlike many students seemed to struggle with the transition to high school when she attended *** High School. [Test.*** , 2641 – 2642]. [STUDENT] struggled with P.E. and her counselor *** and the administrator in charge of the *** worked with her on these issues, eventually waiving that requirement. [Test. *** 2554; Test. *** 2640].
63. The *** High School is an academically rigorous program. [Test. *** 2274; Test. *** 2256; Test.*** 2639]. Many students struggle.
64. Teachers and the school psychologist determined that [STUDENT] was in need of interventions to address her struggles in 9th grade. [Ex. S-3; Test. *** 2272; Test *** 2556; Test *** 2642]. The interventions included access to a room to catch up on work, extra time on assignments and access to a school counselor. [Test. *** 2557; Test. *** 2643]. *** High school staff determined it was appropriate to employ interventions as a first step. [Test.

- *** 2275-2276; Test. *** 2556-2557; Test. *** 2643]. Schools try to exhaust interventions before making a referral for special education. [Test. *** 2669]
- 65.*** High School staff also determined it was appropriate to refer her to CSCT for mental health support. [Test. *** 2276].
- 66.In addition to the interventions and CSCT, *** High School staff referred [STUDENT] for an evaluation under Section 504. [Ex. S-3; Test *** 2283, Test. *** 2559; Test *** 2644]. Through this process, it was learned that [STUDENT] had been diagnosed with ADHD, Major depression and Anxiety Disorder. [Ex..S-3; Test. *** 2645]. The 504 team focus was on study skills, social management (CSCT), providing written and oral instructions as well as accommodating understanding and use of technology. [Ex. S-3; Test. *** 2646]
- 67.In January 2013 in review of [STUDENT]'s 504 plan and progress, it was determined more interventions were necessary so a referral for special education evaluation was made. [Test. *** 2283 – 2284; Test. *** 2562-2563]. Areas of concern were academic, developmental, social/emotional, behavioral and psychological.[Ex. S-4]
- 68.Assessments were selected, academic records were reviewed and consult with CSCT staff and other *** High School staff was done by Ms.*** . [Test. *** 2288 – 2289]. Observations were conducted by Ms. ***. [Ex. S-13; Test. *** 1982] Developmental assessment was done by Ms.***, a social worker now deceased. [Ex. S-13; Test. *** 2293] Family history was also gathered,

- and the history of trauma to [STUDENT] was concerning. [Test. *** 2295-2296]
69. Dr. *** admitted that professionals can select different assessments. [Test. *** 348] and acknowledged a 'host' of assessments were utilized in the evaluation of [STUDENT]. [Test. *** 347]
70. Dr. *** , a clinical psychologist and expert for [DISTRICT] did not believe that additional assessments were necessary. [Test. *** 3024] He further testified the information collected was sufficient and at an acceptable standard of care in order to develop the goals necessary. [Test. *** 2965, 2967 3015]
71. Testing was conducted by Ms. *** to determine information about the student's needs for an IEP. [Test. *** 2292, 2297, 2386]
72. The initial evaluation of [STUDENT] was comprehensive and appropriate. [Test. *** 2390; Test. Mates 3038, 2842 – 2843]
73. Ms. *** did not suspect that [STUDENT] was a student with autism and the information clearly indicated [STUDENT] was an emotionally disturbed student. [Test. *** 2310, 2389-90]
74. Dr. *** indicated that emotional disturbance was an appropriate category for [STUDENT] with the disabilities recognized at the time. [Test. *** 2854] and Dr. *** acknowledged that the information gathered supported a determination of eligibility under emotional disturbance. [Test. *** 351]
75. A nonverbal learning disorder is not indicative of autism and no one observed behaviors indicating [STUDENT] was a student with autism,

[Test. *** 2312; Test. *** 2566; Test. *** 2049; Test. *** 2670]. No evaluation for autism was necessary if there was no reason to suspect autism. [Test. *** 3013]

76. A CSCT assessment was available to Ms. *** at the time of evaluation and the intake assessment did not contain a diagnosis of autism. [Ex. P-54; Test. *** 2372, 2417]

77. The team determined from the evaluation those supports needed and with the mother developed an IEP. Her concerns for [STUDENT] were completing assignments, monitoring grades and assignments and mental health. [Ex S-11] The IEP incorporated self-help, independence, social, emotional and behavioral needs. [Ex.S-11] It also incorporated transition services and instruction needs as well as supplementary aids and services (quiet place to take tests and modifying her assignments to decrease her anxiety) [Ex.S-11]

78. Goals were based upon the evaluation report and were established at what was believed to be an achievable level. [Test. *** 2036] Dr. *** also believed these goals were appropriate to address [STUDENT]'s needs. [Test. *** 2857]

79. [STUDENT]'s mother consented to the IEP on March 7, 2013. [Ex. S-11]

80. Dr. *** acknowledged that [STUDENT]'s grades improved after her IEP was implemented. [Test. *** 388] Her attendance also improved with interventions. [Ex. S-11]

81. During 9th grade [STUDENT]'s home life "was difficult to say the least."
[Test. [MOTHER] 1050] as her brother began using drugs and his behavior
"got progressively worse." [Test. [MOTHER] 1050].
82. According to the mother [STUDENT] and [BROTHER] had a dysfunctional
and unhealthy relationship. [Ex. R-8]
83. [STUDENT] was also having difficult times with her parents. [Ex. R-9]
84. [STUDENT] disclosed in April 2013 to her therapist, *** about violence
between herself and her brother. [Ex. R-16] [BROTHER] entered a
Wilderness Treatment program around this time. [Ex. R-12, Test. [FATHER]
1787]
85. Sometime in the spring of 2013, [STUDENT] started using marijuana. [Test.
[FATHER] 1847-1848] Marijuana can affect school performance. [Test. ***
2864]
86. [STUDENT] did fail two courses at the end of 9th grade in 2013. [Test. ***
2576] It is not unusual for students on an IEP and is not an indication the
IEP is unsuccessful. [Test. *** 2576; Test. *** 2677]. Her case manager,
Ms. *** believed she was making progress. [S-14; Test. *** 2067]
87. It was not appropriate to revise [STUDENT]'s IEP at the end of 9th grade
as [DISTRICT] personnel felt it was her first one and was establishing a
baseline as well as one quarter of progress reporting was insufficient to
determine whether the IEP was appropriate. The effect on [STUDENT] for
the summer break was also considered before revising any IEP [Test. ***
2031, 2034 Test. *** 2677]

88. In late spring or summer, [STUDENT]'s mother was actively looking for alternative placements. [Test. [MOTHER] 1213, 1223]
89. [STUDENT]'s marijuana usage had increased by fall of 2013 to multiple times per day. [Test. [MOTHER] 1211]. She told her therapist that she was thinking of using marijuana at school and at a therapy session in September 2013 with [THERAPIST] she appeared to have used marijuana. [Test. *** 2507-2508]
90. [BROTHER] moved out of the family home in September 2013. This was upsetting to [STUDENT] and [THERAPIST] was aware of the tension in the home. [Ex. R-16, Test. *** 2513].
91. An IEP meeting was held September 4, 2013 where [STUDENT]'s IEP team decided to waive her second year of health and PE and provided an opportunity to recover the credit for this failed class. [Ex. S-9; Test. *** 2578-2579; Test. *** 2679] Her class schedule was also changed. [Ex. S-9]
92. [STUDENT] during this time began to avoid classes and leave campus. It was the first time staff was aware she was leaving campus. [Test. *** 2576-2577; Test. *** 2678]
93. [STUDENT] reported she engaged in risky behaviors including sexual promiscuity and admitted later her marijuana usage affected her school performance. [Ex. S-86; Test. *** 1616]
94. On September 6, 2013, [STUDENT] was placed in detention and on September 17, 2013 she was given an in-school suspension. [Ex. S-3]

95. A meeting was held September 19, 2013 where the IEP team discussed options to address her safety. [Test. *** 2317; Test. ***] This included discussions of part-time school with homebound services. The team did not revise the IEP as the mother stated she did not know where [STUDENT] might be in the future. The meeting ended with the mother taking [STUDENT] to an appointment. [Ex. S-8, S-52, Test. *** 2680]
96. The mother placed [STUDENT] on September 24, 2013 at *** for depression and suicidal ideation where she remained for 5 days, discharged to APHP and on October 14, 2013 was placed in a residential treatment facility, until her discharge on February 18, 2014. [S-71, Test. *** 1219]
97. During October 2013 [STUDENT] was evaluated by Dr.***, a referral her mother received in June 2013. [Test. [MOTHER] 1223; Test. *** 1557]
98. At an October 11, 2013 IEP team meeting, [DISTRICT] staff listened to the mother's concerns and the purpose was to discuss [STUDENT]'s placement at APHP and options to address when [STUDENT] returned to school from [RESIDENTIAL TREATMENT FACILITY]. [Ex. S-10; Test. *** 3205-3206]
99. [STUDENT]'s parents began submitting applications to residential treatment facilities and also alternative placements (***) before any [DISTRICT] meetings to discuss [STUDENT]'s return to school. [Ex. R-8, R-9, Test. [MOTHER] 1235] The mother had informed Dr. *** that she was considering placement outside of [DISTRICT]. [Test. *** 1540]

100. [RESIDENTIAL TREATMENT FACILITY] did not diagnose [STUDENT] as autistic based upon its psychiatric evaluation. [Ex. S-71]
101. [STUDENT]'s mother had asked the private therapists to speak to [DISTRICT] about a residential placement for [STUDENT]. [Test. [MOTHER] 1258]
102. [STUDENT] was discharged from [RESIDENTIAL TREATMENT FACILITY], February 18, 2014 and three days later, February 21, 2014, [DISTRICT] convened an IEP Team meeting. This meeting included [RESIDENTIAL TREATMENT FACILITY] staff members, Dr. *** and [THERAPIST] at the request of [STUDENT]'s mother. [Ex. P-24, Test. *** 3210.
103. The IEP team believed the meeting was to transition [STUDENT] back to High School. [Test. *** 2327; Test. *** 2587]. The meeting lasted two hours. [Test. *** 3225]
104. [RESIDENTIAL TREATMENT FACILITY] presented recommendations including smaller classes and assistance with focus on consistency, structure and patience. They did not state the [STUDENT] required residential placement. [Ex S-6, R-14; Test. *** 3212, 3214; Test.*** 2329]
105. Dr. *** had completed her evaluation and issued two reports in November 2013. [Ex. S-76, R-12] She diagnosed autism and was the first medical professional to do so. [Ex. S-76, R-12; Test. *** 1418].
106. Dr. *** produced a "school version" report in which she indicated her evaluation, recommending that a therapeutic private school that works with

gifted children would be optimal for [STUDENT], recommending the *** program as an alternative. [Ex. S-76]

107. Dr. *** shared her recommendations at the February 21, 2014 meeting, recommending [STUDENT] be placed in small classes, have a one-to-one Para educator, have goals for social cognition, have a high level of structure and have individualized learning, believing placement as close to what [RESIDENTIAL TREATMENT FACILITY] offered. [Test. ***1477-1478]

108. At the time of her report and her recommendations at the February meeting, she believed [STUDENT] could succeed in public school [Test. *** 1635]

109. [DISTRICT] considered Dr. ***'s report but had several concerns [Test. *** 2340], including while aware of [STUDENT]'s marijuana usage, Dr. *** did not include a diagnosis of cannabis use [Test. *** 1558], errs were made regarding academic history/grades during elementary and middle school [Ex. P-8, P-9; Test. *** 1569], not including [STUDENT]'s risk of suicide in the "school version" report [Ex. R-12; Test. ***1642-1644] and assessments that did not correspond with findings. [Test. *** 2877, 2885-2886, 2888]

110. [THERAPIST] presented his recommendations at the February meeting also and he spoke about school structure and support. He spoke of issues of [STUDENT]'s home life. [Test. *** 3223-3224]. He advocated

for a therapeutic boarding school suggesting [STUDENT] could not wait to exhaust other options. [Test. *** 2520]

111. [STUDENT]'s mother requested [DISTRICT] to place [STUDENT] in residential treatment. [Test. *** 2334; Test *** 2593; Test. *** 2685; Test. *** 3224] Ms. *** did respond that [DISTRICT] had not exhausted its resources and [DISTRICT] could support [STUDENT]. [Test. *** 3225] [DISTRICT] regularly serves students with disability category of emotional disturbance, autism and other mental health issues. [Test.*** 2334; Test *** 2600; Test *** 3311]. The sense of the meeting was that the mother only wanted residential placement and any other options were not acceptable for [STUDENT].

112. An autism specialist *** was included in the February 26, 2014 meeting since Dr. *** had made a conclusion that [STUDENT] was autistic.[Test. *** 3227] The meeting was to discuss a plan to transition [STUDENT] back to school. Plans were presented to have a Para educator, CSCT support for mental health and homebound services to assist transition. [Test. *** 2595; Test. *** 2687; Test. *** 3228] The parents rejected this offer. [Test. *** 2339; Test *** 2596; Test. *** 3229]

113. [STUDENT]'s parents refused to allow [STUDENT] to return to [HIGH SCHOOL] because of their concerns. [Test. *** 3232] The resident school, *** needed to participate and [STUDENT]'s parents needed to enroll her which they did. [DISTRICT] was willing to continue to work on the

development of a new IEP. [Test. *** 3230, 3232] Additional assessments for autism and speech were suggested by Ms.*** . [Ex. S-6]

114. Another IEP team meeting was scheduled in early March 2014 but was cancelled by [STUDENT]'s mother. [Ex. S-49; Test. *** 3234]

115. [STUDENT]'s mother refused for her to return to school until a new IEP was developed. [Ex. P-23; Test. *** 3236]. Ms. *** informed [STUDENT]'s mother that [DISTRICT] remained ready to provide services to [STUDENT] upon her return. [Test. *** 3237] The parents refused to allow [STUDENT] to return.

116. An additional assessment was performed by [DISTRICT] and*** , a licensed speech pathologist performed a classroom based as well as speech and language assessments. [Ex. S-12; Test. *** 3052-3053, 3058, 3060] Since [STUDENT] was not in school, Ms. *** performed the classroom assessment while observing [STUDENT] during testing. [Ex.S-12; Test. *** 3058] Assessments that were selected were age appropriate and addressed the concerns of [STUDENT]. [Test. *** 3554-3555] The assessment supported that [STUDENT] was a student with autism. [Test. *** 3560]

117. It is not unusual to diagnose a student with autism later in high school. [Test. *** 3551] An evaluation team meeting was not held as [STUDENT]'s parents wanted a new IEP before [STUDENT] returned to school. [Test. *** 3562]

118. At the March 25, 2014 meeting, the team included [DISTRICT HIGH SCHOOL] staff members, as well as *** and *** who informally presented their assessment results with [HIGH SCHOOL] staff members and the parents. [Ex. S-6; Test. *** 3249; Test. *** 3562]. [STUDENT]'s mother read a statement of concerns and the team considered this information when it developed the new IEP. [Test. *** 3242; Test *** 3549]. The parents sought a replication of [RESIDENTIAL TREATMENT FACILITY] services or residential treatment.
119. [DISTRICT HIGH SCHOOL] staff members that were part of the team included *** with substantial special education teaching experience, who worked with students with autism and *** , also a special education teacher with substantial experience, who had worked with students with significant mental health issues. [Test. *** 2736-37; 2765; Test. *** 3148, 3149, 3162]
120. CSCT services were offered and the parents were contacted by*** , a social worker at [DISTRICT HIGH SCHOOL] regarding accessing these services but she did not receive a response and was then gone on maternity leave [Test. *** 2662] The team was unaware of the parents' response by email. [Test. *** 3271]
121. Another meeting occurred April 8, 2014 and time was spent discussing a full day schedule for [STUDENT], although a partial day was preferred by the parents. [Test. *** 2744; Test. *** 3251]. Focus was on class sizes and courses with supports and safety was addressed. [Test. *** 2744; Test *** 3262; Test *** 3583, 3585-3586] Among the items discussed included

types of classes, sizes, course work, differentiated instruction and all courses meeting graduation requirements and college admission standards. [Test. *** 2747-2748; Test. *** 3164, 3126; Test *** 3584]

122. Homebound services were discussed at this meeting. While homebound is not an option to replace a student attending school, as it is not a long-term solution, it was an available option for transition. [Test. *** 3143] Parents did not accept the services. [Test. *** 2785; Test *** 3239-3240]. There is some dispute whether services were offered at all according to the parents and their length. In any case, [STUDENT] did not receive homebound whether because parents refused, [DISTRICT] did not offer or that the parents wanted a new IEP in place before any services were provided.

123. The IEP was not completed at this meeting, although it lasted two hours. [Ex. S-6; Test *** 3259]

124. A new IEP was developed using the assessments performed by Ms. *** and Ms.*** . [Test. *** 2740; Test. *** 3091; Test. *** 3562]

125. The new IEP covered in detail communication, self-help/independence, social/emotional/behavioral and intervention goals. [Ex. S-6] A Para educator for “eyes on” support was also provided.[Ex. S-6] The team intended to work with [STUDENT] one-on-one as well as across broader school settings. [Test. *** 3692]. The IEP incorporated autism research-based and best practices covering a variety of [STUDENT]’s needs. [Test. *** 3591]

126. Mental health services at [HIGH SCHOOL] through CSCT were to be provided including an addiction counselor, counselors, social worker and school psychologist. [Test. *** 2654; Test. *** 2754-2755, Test. *** 3253-3254] CSCT services were needed to be accessed.
127. [STUDENT] placement at [HIGH SCHOOL] is a combination of regular and special education courses in the least restrictive placement, allowing her interaction with regularly developing peers. [Ex. S-6; Test. *** 3593]
128. At the April 17, 2014 IEP team meeting, the remainder of the IEP was developed with draft goals. [Ex. S-6] Parents were concerned that these were “bare bones”. [Test. *** 2751; Test *** 3079]. Mother was upset and said she did not know what to do as [STUDENT] could not be in school for a full day but needed to work on skills. [Test. *** 3384]
129. Parents again asked for residential placement at [DISTRICT] expense and suggesting the IEP was insufficient. [Test. *** 2761; Test. *** 3283]
130. [DISTRICT] throughout the IEP process was flexible and attempted to address [STUDENT]’s needs. [Test. *** 3076; Test. *** 3137]
131. Before [DISTRICT] finalized a copy of the IEP and its offer of FAPE, parents responded by letter rejecting the IEP and requesting [STUDENT] be placed residentially at [DISTRICT] expense. [Ex. S-15; Test. *** 3294-3295]
132. While parents had planned to place [STUDENT] at a residential placement – *** school within 10 days, this did not occur. [Test. *** 3297-3298]

133. In response [DISTRICT] provide prior written notice addressing the refusal of parents' request for residential placement, the reasons for the refusal, options and other relevant factors with provision of parents' notice of their rights. [Ex. S-18; Test. *** 3299]
134. [DISTRICT] completed its evaluation of [STUDENT] with an ADOS assessment and determined [STUDENT] qualified for IDEA special education and related services under the category of autism. [Test. *** 3300-3301]
135. At an evaluation meeting with the team held June 9, 2014, results were presented. [Ex. S-12, S-39] and an offer made to hold another IEP meeting to discuss the results but parents rejected this offer. [Test. *** 2763; Test. *** 3081; Test. *** 3305-3306; Test. *** 3611]. [DISTRICT] believed there was no need to offer a change of placement because the evaluation supported the IEP offered and addressed [STUDENT]'s needs.[Test. *** 2765; Test. *** 3306; Test. *** 3611]
136. Dr. *** stated that the IEP proposed by [DISTRICT] offered [STUDENT] the opportunity to receive meaningful educational benefit. [Test. *** 2919]
137. [DISTRICT] personnel who participated in the IEP development process testified that [STUDENT] does not require residential placement to make educational progress and that residential placement is not the least restrictive environment. [Test. *** 2351; Test. *** 2600; Test. *** 2693; Test. *** 2767; Test. *** 3083; Test. *** 3149; Test. *** 2767]

138. [DISTRICT] was never provided the opportunity to implement its program of services and supports developed for [STUDENT] through the new IEP it proposed. [Test. *** 2351; Test. *** 3073; Test. *** 3571]
139. Parents are not seeking reimbursement for [RESIDENTIAL TREATMENT FACILITY] but reimbursement for placement at the residential placement, [ACADEMY], including tuition, travel and her computer. Parents are also seeking compensatory education for the period from 2009 until the present as well as compensatory education services after graduation.
140. [ACADEMY] is [STUDENT]'s ideal school as it includes access to horses which is a life-long interest of hers. [Test. *** 948] In applying for private placements, the mother acknowledged a preference for private schools that had access to animals and nature. [Test. [MOTHER] 1274]
141. Since [STUDENT] has been at [ACADEMY], Dr. *** has done another evaluation determining in addition to previous diagnosis that [STUDENT] suffers from schizoaffective disorder due to her history of hallucinations. [Ex. P-70; Test. *** 1482-1483] She changed a diagnosis of anxiety disorder from a generalized to social anxiety disorder and dropped the previous math disability and ADHD diagnosis from her earlier evaluation. [Test. *** 1482,1484,1486]
142. The [ACADEMY] is developed around a program developed by the owners (SUCCESS) which is not research based or peer reviewed. [Test. *** 625,629; Test. *** 239]

143. At [ACADEMY] most students have been determined to be on the autism spectrum [Test. *** 557], it does not employ a special education teacher on staff [Test. *** 557], and it does not employ a speech pathologist, an occupational therapist, and a physical therapist or autism specialist. [Test. [MOTHER] 1291-1292; Test. *** 655] and some of its teachers are not certified. [Test. *** 633, 673, 690]
144. A Master Treatment Plan, which is the private school equivalent of an IEP is created by the therapist [Ex S-81; Test. *** 578; Test *** 459] and from this plan the educational director and the teachers create the Student Educational Opportunity Plan (SEOP), which is required for accreditation standards. [Test. *** 548]
145. As a residential placement, students are not free to leave, are restricted on use of phones and have student behavior systems using punitive measures (“comm block” preventing students talking to one another; a loss of privileges system). [Test. *** 1672; Test. *** 913; Test.*** 718, 719]
146. Although [STUDENT] is doing well academically, she is still exhibiting social difficulties and is not focusing on social skills, avoidant of social interactions and initiating interactions. [Test. *** 686; Test. *** 1649, 1657] She has had disciplinary issues and has missed work assignments. [Test. *** 662, 722]

Conclusions of Law

The Findings of Fact that also constitute Conclusions of Law are incorporated in the Conclusions of Law by reference. Likewise, Conclusions of Law that also constitute Findings of Fact are incorporated in the Findings of Fact by reference. Based upon the above Findings of Fact, the Conclusions of this hearing officer are as follows:

Background

1. The scope of the administrative hearing pursuant to 20 U.S.C. § 1415 of the IDEA is limited to the “complaint” raised to obtain the hearing. County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458, 1465 (9th Cir 1996).
2. The party seeking relief bears the burden of persuasion under the IDEA. E.M. v. Parjara Valley Unified Sch. Dist., 758 F.3d 1162, 1171 (9th Cir. 1996).
3. The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. §1400 et. seq. primary purpose is “to ensure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;...” 20 U.S.C. § 1400(d)(1)(A).
4. The IDEA has been implemented on the federal level with the adoption of regulations found at 34 C.F.R Part 300.
5. Although the IDEA generally requires the provision of FAPE to students aged 3 through 21 (up to age 22), the IDEA defers to State law or practice with regard to the provision of FAPE to children aged 18 through 21.

6. Under Montana law, a child is entitled to attend school "when the child is 6 years of age or older on or before September 10 of the year in which the child is to enroll but is not yet 19 years of age." M.C.A § 20-5-101(1)(a). A child with a disability, who is 6 years of age or older and under age 19, is entitled to received special education services." M.C.A. § 20-7-411(2).

7. The maximum age of eligibility under the IDEA for special education is 22 as 21 year olds are included within the range of ages to which FAPE applies. However, for students 18 through 21, Montana law or practice determines the maximum age of eligibility for special education and related services under federal and state laws. 20 U.S.C. § 1412(a)(1)(B).

8. School district trustees are given discretion to establish and maintain a special education program for a child with a disability who is 19 years of age or older and under age 22 years of age. M.C.A § 20-7-411(4).

Whether the Statute of Limitations Bars Claims Prior to October 2012.

9. The IDEA has a two-year statute of limitations period, "a parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §§ 1415 et seq], in such time as the State law allows." 20 U.S.C. § 1415 (f)(3)(C). The IDEA statute of limitations applies because Montana law does not provide for a separate limitations period.

10. Under 20 U.S.C. § 1415(f)(3)(C), parents are not required to have actual knowledge of their alleged claim under the IDEA. Rather, they are charged with knowledge of their right to a claim when they should have known. Thus, parents are subject to the limitations period upon the earlier occurrence of when they knew or should have known of their claims.

11. There are two exceptions to the application of the limitation period: (1) where the school district engages in specific misrepresentations that it had resolved the problem forming the basis of the complaint; or (2) where the school district withholds information from the parent that is required to be provided to the parent under the IDEA. 20 U.S.C. § 1415(f)(3)(D).

12. Application of the first exception requires a “high threshold” and must result from proof “the school intentionally misled them or knowingly deceived them regarding their child’s progress.” D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 (3rd Cir. 2012). Parents must prove a “schools *knowledge* that its representations of a student’s progress or disability are untrue or inconsistent with the school’s own assessments.” *Id.* at 246. (emphasis in original)

13. The second exception applies only when a school fails to provide parents “with a written notice, explanation, or form specifically required by the IDEA statutes and regulations.” *Id.*

14. School districts are required to provide notice of procedural safeguards under the IDEA: (1) upon the initial referral by the district of the student for an evaluation or the parent’s request for an evaluation; (2) upon the receipt of a complaint to the state under the provisions of the IDEA or receipt of the first

due process complaint in a school year; (3) upon initiating discipline that results in a change of placement for violation of the student code of conduct; or (4) upon the request of the parent. 34 C.F.R. 300.504; see also 20 U.S.C. § 1415(d)(1)(A).

15. School districts are required to provide written notice if it: (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. 300.503; see also 20 U.S.C. § 1415(b)(3).

16. School districts are not required to “preemptively advise parents of their right to have their child evaluated.” D.K., 696 F.3d at 247. Absent an affirmative act by a school district to either propose to evaluate a student or specifically refuse a parent’s request for an evaluation, a school district is not required to provide notice of procedural safeguards or prior written notice. *Id.* at 246-47. A school district does not violate the requirements under 34 C.F.R. 300.503 or 300.504 even where there are allegations that it had sufficient notice of a student’s disability to trigger its duties to evaluate the student under IDEA. Moyer, 2013 U.S. Dist, LEXIS at 24-25.

17. Absent a finding of the circumstances under an exception, claims are barred from a due process hearing if not alleged within two years of when the parents knew or should have known about their claim. 20 U.S.C. § 1415(f)(3)(C).

18. Parents of [STUDENT] knew or should have known according to their own testimony about any claims as early as August 2009, in middle school. [Stip FF ¶ 2, 3, FF¶ 36,37,38, 39] With the concerns they have alleged for [STUDENT]'s behavioral issues including absences and lack of social interactions and academic issues including grades, their claims and request to evaluate [STUDENT] as a student with a disability under the IDEA should have occurred before November 6, 2012. [Stip FF ¶ 5, FF ¶ 37, 39, 40] No [DISTRICT] administrators recall a request and even when a Student Intervention team addressed [STUDENT]'s needs, no evaluation was recommended [FF 41-46, 51, 54-55, 58-59]. At *** High School after a few weeks of schooling, [DISTRICT] identified [STUDENT] as a student with a disability under Section 504 of the Rehabilitation Act of 1973 [Ex. S-3]. In January 2013 there was a referral by [DISTRICT] personnel for an evaluation under IDEA and [DISTRICT] subsequently developed and later implemented an IEP of March 2013.[Ex. S-4,S-11] Requests or claims should have occurred in *** Middle School or with [DISTRICT] between 2009 to 2012.

19. Misrepresentations were not made and although the mother claimed a request for "special education" was made to the school, no school administrator or other school staff recalled any such request and no school knowledge was confirmed that any such request(s) were made to the school or school district. [FF ¶41-44] Furthermore, no information was withheld from the parents. Mother acknowledged that she received and read the ** Middle School Handbooks from 2009-12 [Ex. S-60, S-61, S-62; FF ¶48]

20. The exceptions to the statute of limitations do not apply. The claims are limited to two years to the date of filing of their claim for due process, which was October 1, 2014. Claims predating October 1, 2012 are barred.

Whether [DISTRICT] Violated its “Child Find” Duties and Failed to Provide a Free Appropriate Public Education.

20. The IDEA requires school districts to identify, locate, and evaluate children with disabilities “who are in need of special education and related services.” 20 U.S.C. §1412(a)(3)(A). This is referred to as “Child Find”. Child Find also applies to those children “suspected of being a child with a disability... and in need of special education.” A.P. v. Woodstock Bd. of Educ., 572 S. Supp 2d 221, 224 (D. Conn. 2008).

21. “However, the IDEA is not an absolute liability statute and the ‘Child Find’ provision does not ensure that every child with a disability will be found.” *Id.* at 225.

22. Rather, the IDEA requires that school districts develop policies and procedures that will enable children with disabilities in need of special education and related services to be identified. *Id.*

23. Child Find does not require school districts to designate “every child who is having any academic difficulties as a special education student.” *Id.* Merely having a “qualifying” disability under IDEA is insufficient to be eligible for services under the law unless the child also needs special education and related services. *Id.* As an example, “[t]he mere existence of an ADHD

condition does not demand special education.” Strock v. Indep. Sch. Dist., No. 281, 2008 U.S. Dist LEXIS 22653, 21(D. Minn, 2008).

24 “Whether a school district had reason to suspect that a child may have a disability must be evaluated in light of the information the district knew, or had reason to know, at the relevant time, not in hindsight.” Simmons v. Pittsburg Unified Sch. Dist., 2014 U.S. Dist LEXIS 81085, 18-19 (N.D. CA. 2014) citing Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir 1999).

25. When a student is able to learn and perform in a regular classroom, taking into account that student’s “personal learning style without specially designed instruction,” the fact that the student may suffer minimal adverse effects from an impairment does not render the student eligible under the IDEA. Ashli C. v. Hawaii, 2007 U.S. Dist. LEXIS 4927, 24-25 (D. HI, 2007).

26. The term “special education” means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.” 34 C.F.R. 300.39(a)(1). “Specially designed instruction” is “adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction...(i) to address the unique needs of the child that result from the child’s disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” 34 C.F.R. 300.39(b)(3).

27. A school district’s voluntary modification of a regular education program for a student, even if such modification includes differentiated instruction, to

allow the student to perform within her ability “at an average achievement level” does not mean the student is a student with a disability under the IDEA. Id at 28. Likewise, a classroom teacher’s use of interventions in the classroom to assist the student to perform does not mean that the student requires special education and related services. A.P., 572 S. Supp 2d at 225.

28. A school’s use of pre-referral processes, such as an intervention team, does not violate the IDEA. A.P., 572 F. Supp. 2d at 227-28. Such teams are “ ‘a regular education function’ that give local education agencies an additional tool for assisting and identifying struggling students.” Id. at 228. These “alternative programs’ represent a “sensible policy for [a school district] to explore options in the regular education environment before designating a child as a special education student.” Id.

29. The fact that a student has been “diagnosed” with a non-verbal learning disability is not determinative as “even experts disagree about whether it should be considered a disability at all.” Id. at 226.

30. Although it was alleged by the parents that [DISTRICT] personnel had knowledge of [STUDENT]’s hospitalizations [Test [MOTHER] 1001-1002], [STUDENT]’s treatment by mental health professionals [Ex.S-77, S-78] and later instituted interventions including through a Section 504 plan [Ex. S-3, S-54; FF ¶¶52,56,59-60], it was not proved that [DISTRICT] violated its Child Find duties under the IDEA. [DISTRICT] did not violate the IDEA by failing to evaluate [STUDENT] under the IDEA as a student with a disability, as there was no reason for [DISTRICT] to suspect that [STUDENT] was in need of

special education and related services. [FF ¶ 43-46, 57, 61] Because [DISTRICT] had no reason to suspect [STUDENT] had a disability, it was not obligated to provide her FAPE. 20 U.S.C. § 1414 (a) (1)(A). [FF ¶45-46, 55] 31. [DISTRICT] did not violate its “Child Find” duties under IDEA by failing to identify, locate and evaluate [STUDENT] as a student with a disability under the IDEA while she was in middle school at *** Middle School, 2009-2012. As a result of not violating “Child Find” duties, there was no failure to provide a free appropriate public education (FAPE) during middle school.

Whether [DISTRICT] failed to provide Procedural Safeguards.

32. The IDEA assures that all disabled children receive a “free appropriate public education” through the development of an “individualized educational program” (IEP). 20 U.S.C. §1400(d)(A); Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty v. Rowley, 458 U.S. 176, 183, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982). The IEP is a comprehensive statement of the educational needs of a student and the specially designed instruction and related services that will be employed to meet those needs. Burlington Sch.Comm. v. Dept of Educ., 471 U.S. 359, 368(1985). “The IEP is to be developed jointly by a school officer qualified in special education, the child’s teacher, the parents or guardian, and where appropriate, the child. In several places, the Act emphasized the participation of the parents in developing the child’s educational program and assessing its effectiveness.” Id. At 394, *citing* 20 U.S.C §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2); 34 C.F.R. §§ 300, 345(1984).

33. Parents and guardians play a significant role and must be informed about and consent to evaluations of their child under the Act. 20 U.S.C. § 1414(c)(3). Parents are included as members of “IEP teams.” 20 U.S.C § 1414(d)(1)(B). Parents must be notified in writing of the procedural safeguards available to them. 20 U.S.C S 1415(d)(1).” Schaffer v. Weast, 126 S.Ct. 528, 532 (2005).

34. The Supreme Court has held that “a court’s inquiry in suits brought under [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” Rowley, 458 U.S. at 206-07.

35. Compliance with the IDEA procedures is “essential to ensuring that every child receives a FAPE, and those procedures which provide for meaningful parental participation are particularly important.” Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 890 (9th Cir. 2001).

36. Procedural flaws in the IEP process do not always amount to a denial of a FAPE. L.M. v. Capistrano Unified School Dist., 556 F.3d 900,909 (2009) citing Target Range Sch. Dist No. 23, 960 F.2d 1479, 1483 (9th Cir. 1992)

37. Once a procedural violation of the IDEA occurs, it must be determined whether that violation affected the substantive rights of the parent or child. Procedural inadequacies that result in the loss of educational opportunity, or seriously infringe upon the parents’ right to participate in the IEP formulation process, clearly result in the denial of a FAPE. Ms. S. ex rel. G v. Vashon

Island School Dist., 337 F. 3d 1115 (9th Cir 2003); Capistrano, 556 F.2d at 909, citations omitted.

38. [DISTRICT] did not fail to provide notice of procedural safeguards because it never proposed to evaluate [STUDENT] prior to February 2013 nor was there a request for an evaluation. [FF ¶ 42-44, 59, 61] [DISTRICT] did not fail to provide procedural safeguards by failing to identify [STUDENT] as a student with a disability under IDEA from 2009 through February 2013.

39 There were no procedural inadequacies from 2009 through February 2013 that resulted in the loss of educational opportunity, or which seriously infringed upon the parents opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits. [STUDENT] was provided various interventions in middle and high school and when she was referred for an evaluation under IDEA, her parents fully participated.

Whether the [DISTRICT] initial evaluation was adequate

40. Before a school district is required to provide a student with a FAPE under the IDEA, it must first evaluate the student and determine whether the student is eligible for special education and services. 20 U.S.C. § 1414(a)(1)(A). Once a school district has determined a student is eligible for special education, it must then implement an individualized education program (IEP) and determine the appropriate educational placement for that student. *Id.*

41. The IDEA requires school districts to evaluate a student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(A). The determination of what

disabilities should reasonably be suspected should be made on the basis of reviewing existing data, including psychological and medical reports, teacher observations and reports, and parental reports. See C.M. v. Dep't of Educ., 476 Fed Appx. 674, 677 (9th Cir 2012).

42. When conducting an evaluation under the IDEA, a school district is obliged to “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent.” 20 U.S.C. § 1414(b)(2)(A). This means the school district personnel cannot use “any single measure or assessment as the sole criterion” to determine eligibility or the elements of an appropriate educational program. 20 U.S.C. §1414(b)(2)(B). The assessments and evaluation materials must be administered by trained and knowledgeable personnel. 20 U.S.C. §114(b)(3)(A)(iv). The assessments and evaluation materials must be “used for purposes for which the assessments or measures are valid and reliable.” 20 U.S.C. §1414(b)(3)(A)(iii).

43. To be qualified as a student with an emotional disturbance, the student often demonstrates an “inability to build or maintain satisfactory relationships with peers and teachers.” A.R.M. MT 10.16.3015(1)(a).

44. Students do not have a right to a “proper” disability classification under the IDEA. 20 U.S.C §1412(a)(3)(B). “Nothing in [the IDEA] requires that children be classified by their disability so long as each child who has a disability listed in [§1401] and who, by reason of that disability, needs special

education and related services is regarded as a child with a disability under [the IDEA].” Id.

45. [STUDENT]’s evaluation was not demonstrated to be inadequate. It did use a variety of assessments and they were administered by trained and knowledgeable personnel. [Ex. S-5; FF ¶¶68, 70-73, 76] [DISTRICT] conducted a comprehensive evaluation using a variety of assessment tools in all the areas of suspected disability at the time. Testing gathered information relevant to functional, developmental and academic instruction, including information provided by [STUDENT]’s parents. [Ex. S-13, FF ¶¶74-75, 77]

Whether [DISTRICT] failed to develop an adequate IEP in 2013.

46. The IEP is a written statement for each child with a disability that is developed, reviewed and revised in a meeting in accordance with 34 CFR §§ 300.320 through 300.324. The IEP must include, among other components: 1) a statement of the child’s present levels of academic achievement and functional performance; 2) a statement of measurable annual goals designed to meet the child’s needs; 3) a statement of the special education and related services and supplementary aids and services, based upon a peer-reviewed research to the extent practicable, to be provided to the child; 4) a statement of the program modifications or supports for school personnel; in the case of a child whose behavior impedes learning, a consideration of the use of positive behavioral interventions and strategies, and other strategies, to address that behavior. 34 C.F.R. §§ 300.320(a) and 300.324 (a)(2)..

47. A court must determine the appropriateness of the IEP to provide an educational benefit at the time it is made and based upon the evaluate data available at the time of the formulation. Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir 1999).

48. The Ninth Circuit has held that an educational plan must be judged according to information available at the time the plan was implemented. “Actions of the school system cannot ... be judged exclusively in hindsight. An individualized education program (IEP) is a snapshot, not a retrospective. In striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” Adams, 195 F. 3d at 1149-50. quoting Fuhrmann v. E. Hannover B. of Educ., 993 F.2d 1031, 1041 (3rd Cir. 1993).

49. The Ninth Circuit has held that the prohibition against the exclusive use of hindsight does not preclude some consideration of subsequent events. Adams, 195 F.3d at 1149-1150. “The clear implication of permitting some hindsight is that additional data, discovered late in the evaluation process, may provide significant insight into the child’s condition, and the reasonableness of the school district’s action, at the earlier date.” E.M. v. Pajaro Valley Unified Sch. Dist., 652 F.3d 999, 1006 (9th Cir. 2011).

50. A public agency has an affirmative duty to ensure an appropriate comprehensive evaluation is conducted. Failure to do so is a denial of FAPE.

See, e.g. Hellgate, 541 F.3d at 1209-10; Union Sch. Dist. v. Smith, 15 F.3d 1519, 1523 (9th Cir. 1994)

51. As long as the IEP takes into account what was and was not objectively reasonable when it was drafted, it need not be perfect. G.M. v Saddleback Valley Unified Sch. Dist., 583 Fed Appx 702, 703 (9th Cir 2014) (citing Adams, 195 F.3d at 1149)

52. Considering whether [DISTRICT]'S initial evaluation of [STUDENT] in February 2013 was adequate, the IEP developed was consented to by [STUDENT]'s mother in March 2013 and implemented.[Ex. S-11; FF ¶¶77-79] Taking into account what was known about [STUDENT] at the time, it was adequate and was reasonable. [Ex. S-11; FF ¶¶69, 70-76, 80]. Parents have failed to sustain their burden in demonstrating that [DISTRICT]'S evaluation of [STUDENT] in 2013 was not adequate.

Whether [DISTRICT] Failed to Develop from 2009 to the Present an IEP Offering a Free Appropriate Public Education.

53. An IEP was not required from 2009 to 2013 as an evaluation was not required as already concluded. An evaluation and IEP, however, were done in February - March 2013. [Ex. S-11; Stip FF ¶¶3, 5-13] The inquiry now is whether the proposed April 2014 IEP offered a free and appropriate public education.

54. Under the IDEA, the burden of proof in an administrative hearing challenging the appropriateness of an Individualized Education Program is on the party seeking relief, which in this case is [STUDENT].

55. A public agency must review and revise a student's IEP at least annually 20 U.S.C. §1414(d)(3)(A) & (d)(4)(A); 34 C.F.R. §300.324(a)(1) & (b)(1). The March 2013 IEP was in effect when the February 2013 meetings took place. [Ex. S-11]

56. Subsequent evidence of progress or lack of progress is a relevant factor in determining the appropriateness of the IEP at the time it was made, but it is not outcome determinative. The relevant inquiry is whether the IEP was reasonably calculated to provide educational benefit.

57. The expertise of school districts in educational methods may be given due weight in considering an IEP's compliance with the IDEA. Ms. S. ex rel. G v. Vashon Island Sch. Dist., 337 F.3d 1115, 1133(9th Cir 2003)

58. The amount of appropriate progress depends on each student. A failing grade is not dispositive on the issue of a denial of FAPE. In re Conklin, 946 F.2d 306, 313 (4th Cir 1991)

59. The appropriateness of each IEP must be determined independently and judged on its own merits. Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir 1999); See also Anchorage Sch. Dist., 689 F3d at 1058.

60. "An IEP need not conform to a parent's wishes in order to be sufficient or appropriate." Virginia S. v. Dep't of Educ., 2007 U.S. Dist. LEXIS 1518, 44 (D. HI, Jan 8, 2007).

61. Delays in meeting IEP deadlines do not deprive a student of FAPE where there is no deprivation of educational benefit. Doug C. v. State of Hawaii Dept. of Educ., 720 F.3d 1038, 1046 (9th Cir. 2013). It is not per se

unreasonable to delay meeting an annual review deadlines in order to ensure that the parents can attend IEP meetings and participate. Id. (school district unreasonably prioritized strict deadline compliance over parent participation in an IEP meeting).

62. The IEP team has discretion to determine the goals to include in an IEP. The IEP should not include so many goals that the student cannot reasonably complete them. Clarion-Goldfield Community School District, 22 IDELR 267, *12 (Iowa SEA Oct 18, 1994)

63. Parents have alleged their concerns were disregarded by IEP team members and there was a predetermined outcome for [STUDENT] and, in fact a practice district wide against alternative placements. .

64. When records demonstrate that discussions took place and alternative placements were rejected, it does not support allegations of a predetermined outcomes. A.P. v. New York City Dep't of Educ., 115 LRP 34814 (S.D. N.Y. 2015). [FF ¶

65. Furthermore, to be entitled to private school costs, a parent must provide 'hard evidence' that the school is factually incapable of implementing the student's IEP. S.E. v. New York City Dep't of Educ., 65 IDELR 295 (S.D. N.Y. 2015).

66. Considering whether [DISTRICT]'S' proposed April 2014 IEP was adequate and offered FAPE, the proposed IEP and additional assessment/evaluation were appropriate and adequate. [Ex.S-6, S-12; Stip FF ¶ 10, 12,15 – 16, 18-19, 22-23,25-26, FF ¶ 86-87, 91-92,94-95, 96, 98,

100, 102-107, 109-116, 118, 120-122, 124-128, 130-13, 134-138] Parents have not met their burden in challenging the appropriateness of the proposed April 2014 IEP.

Whether [DISTRICT] Failed to Provide Adequate Written Prior Notice under IDEA

67. Where a school district refuses a placement requested by a parent, it shall provide prior written notice to include: a description of the action refused by the district; an explanation of why it refused to take the action and a description of the evaluation procedures, assessments, record, or report it used as the basis for its refusal; a statement that the parents have protection under the IDEA procedural safeguards and the means by which a copy of the procedural safeguards can be obtained; sources for parents to contact to obtain assistance in understanding the provisions of the IDEA; a description of other options considered by the IEP team and why those were rejected; and a description of factors relevant to the district's refusal. 20 U.S.C. § 1415(c)(1).

68. The adequacy of a prior written notice does not result in a denial of FAPE unless it "seriously" infringes on the parents' opportunity to participate in the IEP process. See, e.g. Anchorage Sch. Dist., 689 F.3d at 1054.

69. There were no procedural inadequacies that resulted in the loss of educational opportunity, or which seriously infringed upon parents opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits. The IEP was reasonably calculated to enable

[STUDENT]. to receive educational benefit. Anchorage Sch. Dist., 689 F. 3d at 1057.

70. [DISTRICT]'s prior written notice dated May 5, 2013 meets the requirements of 20 U.S.C §115(c)(1). [Ex. S-6, S-8, S-12; Stip FF ¶ 10, 12, 15-16, 18-26, FF ¶¶ 77, 91, 95, 98, 102, 112-116, 118, 121, 128, 130, 133]

Whether [STUDENT]' parents are entitled to reimbursement for the non-medical costs of placing [STUDENT] at [ACADEMY] beginning July 2014 because of failure to provide FAPE; whether Petitioners are entitled to reimbursement for the non-medical costs of placing [STUDENT] at [ACADEMY] as compensatory education; whether Petitioners are entitled to compensatory education from the 2009-2010, 2010-2011, 2011-2012, 2012-2013 and 2013-2014 school years.

71. Reimbursement is not guaranteed even where there is a determination of a denial of FAPE and a determination that the private placement is appropriate. Forest Grove Sch. Dist., 638 F. 3d at 1239. Rather, all 'equitable factors' must be considered to determine whether reimbursement for some or all of the costs is merited. *Id.*

72. A parent's unreasonable actions in placing a student unilaterally can also reduce or eliminate the need for reimbursement even if there has been denial of FAPE. 20 U.S.C. § 1412(a)(10)(C)(iii)III).

73. All relevant equitable factors should be considered regarding *both* parties' conduct, including but limited to, the parents' notice to the school district before initiating the alternative placement, the existence of other, more suitable placements, the parents' efforts in securing the alternative

placement; the level of cooperation by the school district. Anchorage Sch. Dist., 689 F.3d at 1059 (emphasis in original)

74. Like reimbursement, compensatory education is an equitable remedy if there has been a denial of FAPE. Dep't of Educ. V. R.H., 2013 U.S. Dist. LEIS 92739, 20-21 (D. HI July 1, 2013).

75.. A parent's right to reimbursement for costs related to unilateral placement of a child in a facility outside of the resident school district is extremely limited under the IDEA. See Ashland Sch. Dist. V. Parents of R.J., 588 F.3d 1004, 1009 (9th Cir 2009). Parents are entitled to reimbursement for non-medical costs related to their unilateral decision to place their child without the consent of the resident school district "only when a school district fails to provide a FAPE *and* the private-school placement is appropriate." *Id.* (emphasis in original)

76. The parents' unilateral placement of a student in a private school or facility is appropriate "only if it is 'necessary to provide special education and related services.'" *Id.* This question turns on "whether the 'student is incapable of deriving educational benefit outside of a residential placement.'" *Id.* The requirement that the placement is appropriate is "essential to ensuring that reimbursement awards are granted only when such relief further the purposes of the [IDEA]" *Id.*

77. If the placement is a response to medical, social, or emotional problems apart from the learning process, it is not necessary under the IDEA. *Id.* at

1010. Rather, the placement is appropriate only if it is necessary to meet the student's educational needs. *Id.*

78. The student's home life, risky behaviors outside of the school setting, and drug use are relevant factors for consideration of the necessity of the placement. *Id.* at 1010 (school district not responsible for payment of private placement despite student engaging in risky sexual behaviors with males, self-harm behaviors at school, some failing grades, lying. Lack of work completion and tardiness); Forest Grove Sch. Dist. V. T.A., 638 F. 3d 1234, 1239-41 (9th Cir 2911) (school district not responsible for payment of private placement after not evaluating student for IDEA eligibility where placement related to drug use and behavioral problems despite student having failing grades and placement being motivated in part by disabilities); see also Sylvie M. v. Bd. Of Educ. Of Dripping Springs Independent Sch. Dist., 48 F. Supp. 2d 681, 685-99 (W.D. TX 1999)(school district not responsible for private placement despite student's suicide attempts and threats, depression, failing grades, lack of work completion, peer bullying, contentious relationship with parents).

79. School districts are not required to pay the costs for students who require private placement in response to medical issues, including psychological and psychiatric issues. Clovis Unified Sch. Dist. V. California Office of Admin. Hearings, 903 F.2d 635, 645 (9th Cir 1990).

80. The placement, moreover, must provide educational instruction specifically designed to meet the unique needs of the student and provide

such support services as are necessary for the student to benefit from the instruction. C.B. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1159 (9th Cir 2011).

81. Simply because a student's grades are noticeably higher in a private placement does not mean that it is an appropriate setting. Sylvie M., 48 F. Supp. 2d at 698; see also Forest Grove Sch. Dist., 638 F. 3d at 1241 (fact that student made academic progress at private school does not mean that student was placed for educational reasons). Rather, this might indicate that the setting is optimal. Sylvie M., 48 Supp. 2d at 698. School districts are not required to provide the best or optimal setting, they are required to ensure students are receiving educational benefit. *Id.*

82. The appropriateness of the private school placement is relevant only if there is a determination the school district failed to provide FAPE. Ashland Sch. Dist., 588 F.3d at 1009

83. [DISTRICT] offered and provided [STUDENT] a free appropriate public education with the referral by [DISTRICT] in January 2013, an evaluation in February 2013 and developed IEP in March 2013 consented to by [STUDENT]'s mother. The March 2013 IEP was agreed to and implemented. [DISTRICT] did not deny [STUDENT] FAPE through the IEP that was implemented beginning March 2013. There was no denial of FAPE alleged by the parents prior to this referral or at the time that the March 2013 IEP was in effect. In September 2013 meetings were held to address further issues under [STUDENT]'s March 2013 IEP including absences, leaving the school

grounds as well as safety concerns with other students. The parents then removed [STUDENT] in September placing her first in a *** hospital then a [RESIDENTIAL TREATMENT FACILITY]. [DISTRICT] did not deny FAPE from 2009 until 2013 as alleged in the due process complaint.

84. Parents of [STUDENT] are not entitled to reimbursement for their placement of [STUDENT] at [ACADEMY] because [DISTRICT] provided FAPE. Ashland Sch. Dist., 588 F. 3d at 1009. [DISTRICT] timely proposed an IEP that provided FAPE to [STUDENT]. This IEP was reasonably calculated to enable [STUDENT] to receive educational benefit. Anchorage Sch. Dist., 689 F. 3d at 1057. [STUDENT] is capable of deriving educational benefit at [DISTRICT] and has been placed unilaterally at [ACADEMY] for reasons apart from learning. Ashland Sch. Dist., 588 F. 3d at 1009. [FF¶ 140-141, 143-144]

85. [STUDENT]'s placement at [ACADEMY] is also not appropriate.[FF¶ 140, 142-143] It is not the least restrictive environment for [STUDENT]. [FF ¶145] [THE ACADEMY] does not provide educational instruction designed to meet [STUDENT]'s needs or provide the support services necessary for her to benefit from instruction. [FF¶146]

Transition Services and Regular Diploma

86. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include appropriate post-secondary goals and the transition services needed to assist the child in reaching those goals.

34 C.F.R. § 300.320(b). Transition services must be designed within a results-oriented process that is focused on improving the academic and functional achievement of the student to enable her to move from school to post-school activities. 20 U.S.C. § 1401(34); 34 C.F.R. §300.43(a)(1).

87. The specific services to be offered in a transition plan include: (1) instruction, (2) related services, (3) community experiences, (4) development of employment and other post-school adult living objectives, and (5) if appropriate acquisition of daily living skills and a functional vocational evaluation. 34 C.F.R. §300.43(a)(2).

88. The IDEA does not specify the precise requirements that must be met for a student to earn a regular diploma. The determination of whether a student has earned a regular diploma is made pursuant to State law. Establishment of appropriate substantive standards for graduation is a matter of State law for both disabled and non-disabled students. The U.S. Department of Education's Office of Special Education Programs (OSEP) has explained that students with disabilities do not have a guaranteed right to receive a regular high school diploma. Letter to Anonymous, 22 IDELR 456 (OSEP, Response to Inquiry, 1994).

89. Under Montana law, a student is eligible for a regular diploma if he or she meets one of the following two conditions. The student must either earn the required number of credits, as specified in A.R.M §10.55.905-906, or successfully complete the goals identified in an Individualized Educational

Program (IEP) as specified in A.R. M. § 10.55.805(4); see also, §10.16.3345(5).

90. Many students with disabilities who receive instruction and related services under the IDEA will satisfactorily complete full-unit courses in the academic areas specified by Montana law and thus, earn credits. Some students with disabilities do not satisfactorily complete full-unit courses and for these students a diploma may be awarded upon successful completion of their IEP goals.

91. A student's statutory entitlement to FAPE continues until the student earns and is awarded a regular diploma or until the student reaches the maximum age of eligibility under State law or practice, whichever occurs first. 20 U.S.C. §§1412(a)(1)(B), 1414(c)(5)(B)(1) (2004); 34 C.F.R. §300.102(a)(3).

92. [STUDENT] would be entitled to transition services as she is currently 17 years of age and she is capable of earning a regular diploma.

This hearing officer has seen all the admitted evidence and heard all the testimony, weighed it thoroughly, and has determined that [STUDENT] was provided FAPE. Starting with the initial [DISTRICT] evaluation in February 2013 and resulting in the March 2013 IEP consented to by the parents, [DISTRICT] continued to work with [STUDENT]'s parents after issues arose in September 2013 and then attempted to continue to work in October 2013 to address [STUDENT]'s discharge from hospitalization at ***, subsequent placement at the residential treatment facility and discharge and to work from February 2014 until April 2014 to revise and offer an IEP

in April 2014. It was rejected by the parents but then [DISTRICT] did complete the additional assessment and evaluation resulting in a final meeting in June 2014 that qualified [STUDENT] for IDEA special education and related services under the category of autism. The parents unilaterally placed [STUDENT] in July 2014 at a therapeutic boarding school requesting reimbursement from [DISTRICT].

ORDER

Having determined that FAPE was not denied, [STUDENT] as a resident of the [DISTRICT] is entitled to enrollment and qualified for IDEA special education and related services under the category of autism as determined as of June 9, 2014. An evaluation meeting and updated IEP are required within 30 days of the date of this Order. Included will be provision for graduation with a regular diploma as well as transition services for [STUDENT].

DATED this 21st day of August, 2015.

/s/ Christopher L. Manos
Christopher L. Manos, Hearing Officer

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 21st day of August, 2015, a true and exact copy of the foregoing was send by electronic mail, and deposited for delivery by standard mail delivery to:

[parents' attorney]

[district's attorney]

Linda Brandon-Kjos
Office of Public Instruction
Legal Division
PO Box 202501
Helena, MT 59620-2501
lbrandon@mt.gov

DATED this ____ day of August, 2015.

/s/ Christopher L. Manos
Christopher L. Manos, Hearing Officer